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In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Petition and Argument for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In United States Supreme Court.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

The petition of Frank H. Pierce, respectfully shows:

I. That, being a citizen of Alabama, on the 22 January, 1892, he brought suit, in the Circuit Court of Jefferson county, for that State, against The Tennessee Coal, Iron and Railroad Company, a corporation, for damages for breach *in toto* of a contract in writing entered into between said defendant and petitioner. The said contract so sued on is set out in the complaint filed, which is shown on pages 13-14 of the record filed herewith.

II. That said defendant appeared in said cause and filed demurrers to the complaint—and the demurrers were sustained by said Circuit Court—and, your petitioner standing upon his complaint as filed and refusing to amend, final judgment was rendered in favor of the said defendant.

See demurrers, Record 17; Judgment, p. 18.

IIII. That petitioner appealed said cause to the Supreme Court of Alabama, when the cause coming on regularly to be heard, the said judgment was in all things reversed, The said Supreme Court holding, after full argument, that said contract so sued "bound the defendant to its performance, so long as plaintiff should be disabled by reason of the injuries he re-

ceived, which under the averment that he was permanently disabled, will be for life."

The opinion of said court is reported in 110 Ala. Rep., 533.

IV. That said cause being remanded to said Circuit Court of Jefferson county to be proceeded with in accordance with the ruling of the Supreme Court, the said defendant, norminally on the ground of local prejudice but really to avoid the effect of said ruling, had said cause removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, upon the petition and proceedings shown in the record herewith filed, pages 1 to 21.

V. That petitioner moved said Circuit Court of the United States to remand said cause to the State Court, but said motion was refused.

See Record, 21-22.

That afterwards said cause came on to be heard and petitioner recovered a judgment against defendant for the sum of $5,893.00.

VI. That the plaintiff and defendant each took a bill of exceptions and appealed by writ of error from the said judgment to the United States Circuit Court of Appeals for the Fifth Circuit—and that said cause came on to be heard in June, 1897, and on such hearing the said United States Circuit Court of Appeals rendered a judgment and filed an opinion therein, shown in the record herewith filed, holding that petitioner had shown no cause of action in his said complaint, and that the demurrers interposed in the State Court and which were overruled by the State Supreme Court and which were allowed, against petitioner's objection, to be reconsidered in the said Circuit Court of the United

States, were good, and directed the said Circuit Court of the United States to dismiss thereon petitioner's said action.

VII. That said cause has been remanded to said Circuit Court of the United States to be proceeded with in accordance with the said judgment of the Appellate Court and will be dismissed at the approaching term of said court, unless restrained by the order of this court.

VIII. That the said defendant below did not, as required by law in the case of removal of causes, file a full and complete transcript of the record and proceedings of the State Court in said cause, but omitted therefrom all the proceedings of the said Supreme Court of the State therein. That nevertheless, although said omission was shown on the record produced and filed by said defendant, (See Record, p. 20) the said Circuit Court of the United States refused to remand the same to the State Court and retained jurisdiction of said cause, as did the said Circuit Court of Appeals, giving the said defendant the benefit of the omission by its own fault of said proceedings in the Supreme Court from the record, so as to avoid the estoppel thereof against the said defendant. Nevertheless, in the argument of said cause by counsel, both in the lower and appellate courts, the fact of said proceedings in the Supreme Court of the State were conceded and the opinion of said Supreme Court was attempted to be avoided by insisting that it was not binding on the Federal Court and also that the amendment of the complaint in the Circuit Court of the United States shown on page 25 of the record, stated a new cause of action, whereas said amendment in no manner changed the substance of the contract declared on and construed by the State Supreme Court.

Inasmuch as petitioner is without other remedy, and as he is entitled to the benefit of the construction of his said contract by the Supreme Court of the State of Alabama, he prays that this Honorable court will grant to him a writ of *certiorari* directed to the said Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to this court the record and proceedings in said cause of the Tennessee Coal, Iron & Railroad Company, plaintiff in error versus Frank H. Pierce, defendant in error, and of Frank H. Pierce, plaintiff in error versus Tennessee Coal, Iron & Railroad Co., defendant in error, that full and ample justice may be done in the premises by the review thereof by this Honorable court, which petitioner prays may be had and done. And petitioner will ever pray.

FRANK H. PIERCE,
per W. A. GUNTER, his Attorney.

UNITED STATES OF AMERICA,
Middle District of Alabama.

William A. Gunter, being duly sworn, doth depose and say:

I was the attorney for said Frank H. Pierce in said suit above mentioned, and conducted the same for him throughout all the proceedings therein up to this application, and I know and state that the matters set forth in the foregoing petition of said Frank H. Pierce are true as therein stated.

Sworn to and subscribed before me, J. W. Dimmick, ~~U. S. Commissioner~~ and Clerk of U. S. Court for the Middle Dist. of Ala., this 9 day of Sept, 1897.

W. A. GUNTER.

In Supreme Court United States.

OCTOBER TERM, 1897.

Ex parte FRANK H. PIERCE.

Brief for Petitioner by W. A. GUNTER.

Statement of the Case.

Pierce sued in the State Circuit Court upon a contract set out in the complaint, Record, p. 13; the defendant, the Tennessee Coal Iron & Railway Co. demurred. The court sustained the demurrer, the plaintiff refused to plead over and judgment went for defendant. On appeal this judgment was reversed, the court construing the contract sued on to the effect that plaintiff had stated a good cause of action and that defendant was bound by the contract to pay the monthly payments stipulated to be paid as long as plaintiff was disabled, and if he was permanently disabled as alleged that it would be for life. The case is reported in 19 South. Rep. 22 and 110 Ala. 533. When the case went back to the State Circuit Court the defendant below removed it to the Circuit Court of the United States sitting at Birmingham, Ala., on the ground nominally of local prejudice, but really to escape the decision of the Supreme Court of the State. The defendant omitted from the transcript filed in the Circuit Court of the United States, all the proceedings

in said case in the Supreme Court, and, though such omission was apparent from the record filed (see Record, p. 20), the said Circuit Court refused petitioner's motion to remand said cause to the State Court, and retained jurisdiction thereof, as did said Appellate Court. Record, p. 21.

The defendant insisted that the same demurrers decided by the Supreme Court of the State Court should be retried by the Circuit Court of the United States and they were so retried and overruled. Record, p. 28.

The plaintiff amended the complaint by inserting in the contract a line omitted in copying but not altering the legal effect and substance of the contract. (See Record, pp. 25-6 for amendment). The defendant interposed same demurrers and they were again overruled. Record, p. 28.

The case then went to trial and plaintiff had judgment for $5,893.00—and both parties brought same to the Circuit Court of Appeals.

The Appellate Court held that the demurrers which had been overruled by the Supreme Court of the State were good and directed the Circuit Court to dismiss the case thereon.

It is deemed unnecessary to state more of the case on this application, since the only available ground to be urged in a case of this kind for the writ of *certiorari* is the retention of jurisdiction in the absence of a full record from the State Court, by the fault of the party removing the case, or the refusal to respect and observe the *res judicata* of the case established by the decision of the State Supreme Court.

If the court can and will regard the proceedings in the State Supreme Court as part of the case, as was done in Forsyth v. Hammond, 166 U. S. 506, petitioner would prefer the case to remain and be tried in this jurisdiction.

ARGUMENT.

The defendant below having had a trial in the State Court on its demurrers, the construction placed upon the contract, which was directly involved in the demurrer, became the law of the case which followed it when it was removed to the Federal Court.

Davis v. St. Louis, etc., 25 Fed. Rep. 786.
Cleaver v. Traders Ins. Co. 40 Fed. Rep. 863.
Williams v. Conger, 125 U. S. 397-418.
Ib. 40 Fed. Rep. 711 and cases there cited.
Northern Pac. R. R. Co. v. Ellis, 144 U. S. 458.
Clark v. Keith, 106 U. S. 464.

The reversal and judgment by the State Court stood as if by this court. The amendment of the complaint did not affect the substance of the contract since it consisted only of the addition of an alternative clause in the recitals of the contract anterior to the contractual part. See amendment, Record, p. 25. The *res judicata* was therefore complete.—Ib.

The proceedings in the State Supreme Court were treated by the courts and counsel as in the case—they were omitted from the transcript by the fault of the party removing the cause, who therefore, cannot take advantage of its own wrong. This court may, like the other courts, look at these proceedings and measure the parties rights by them. It is no objection to granting the writ prayed, that the lower court has not yet obeyed the injunction of the Appellate Court to dismiss petitioner's cause.

Forsyth v. Hammond, 166 U. S. 506.
Am. Const. Co. v. Jacksonville Rw., 148 U. S. p. 384.
The Conqueror, 166 U. S. 110.
The Three Friends, 166 U. S. 1.

It is against public policy and the regularity of judicial procedure to permit parties, on any pretense, to escape the *res judicata* of one jurisdiction by a removal of the cause into the Federal Courts, and for the latter courts not to observe and respect the decisions of the State Courts.

This case, therefore, seems to fall directly within the rules regulating the granting of the writ of *certiorari* as stated in Forsyth's case at pages 514-15 of 166 U. S. Rep.

W. A. GUNTER,
Atty. for Petitioner.

W. A. Gunter
Atty for petitioner